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In The
Supreme Court of the United States

KIP RAMSEY, d/b/a TIIN-MA LOGGING CO.;
TIIN-MA LOGGING CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS CONFLICTS WITH PRIOR RULINGS OF THIS COURT REQUIRING LIBERAL CONSTRUCTION OF INDIAN TREATY LANGUAGE IN TAX EXEMPTION CASES	3
II. THE OPINION OF THE COURT BELOW CONFLICTS WITH THE LIBERAL STANDARDS FOR TREATY CONSTRUCTION OF FEDERAL TAX EXEMPTIONS EMPLOYED BY THREE OTHER CIRCUIT COURTS	7
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Carpenter v. Shaw, 280 U.S. 363 (1930) 2, 5, 6

Chickasaw Nation v. United States, 208 F.3d 871 (10th Cir. 2000) 9, 10

Choate v. Trapp, 224 U.S. 665 (1912) 2, 5

Choteau v. Burnet, 283 U.S. 691 (1931) 7

Confederated Tribes of the Warm Springs Reservation of Oregon v. Kurtz, 691 F.2d 878 (9th Cir. 1982) 4, 9, 10

Cree v. Flores, 157 F.3d 762 (9th Cir. 1998) 2, 4

Holt v. Commissioner of Internal Revenue, 364 F.2d 38 (8th Cir. 1966) 9, 10

Jones v. Meehan, 175 U.S. 1 (1899) 5

Kansas Indians, 72 U.S. (5 Wall.) 737 (1866) 5

Karmun v. Commissioner, 749 F.2d 567 (9th Cir. 1984) 4

Lazore v. Commissioner of Internal Revenue Serv., 11 F.3d 1180 (3rd Cir. 1993) 8, 9, 10

Ramsey v. U.S., 302 F.3d 1074 (9th Cir. 2002) 3, 4, 5, 7, 10

Squire v. Capoeman, 351 U.S. 1 (1956) 2, 6

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 5, 7

STATUTES AND RULES

Curtis Act of 1898, 30 Stat. at L. 505, chap. 517 5

25 CFR Part 163 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

The Treaty of June 9, 1855, 12 Stat. 951.....1, 4, 5

INTEREST OF *AMICUS CURIAE*[1]

The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) is a federally recognized Indian tribe that has inhabited and occupied the mid-Columbia River Basin since time immemorial. In the Treaty of June 9, 1855 (12 Stat. 951), the Yakama Nation reserved a homeland of over 1 million acres now known as the Yakama Reservation.

The Yakama Nation is particularly interested in this case because it has a clear impact on the economic development of the Yakama people. Jobs and other income for tribal members have always been scarce, as they are on many Indian reservations. Timber is the most important resource on the Yakama Reservation, and for many years the U.S. Bureau of Indian Affairs has managed logging operations for the tribe under authority of 25 CFR Part 163. Kip Ramsey, the petitioner in this case, is only one of many enrolled Yakama members who currently own logging companies with BIA contracts to remove timber from the Reservation. These companies ship timber off-reservation by truck to forest products companies all over the Pacific Northwest. As these businesses grow, the financial impact of federal taxation on shipping will become more acute.

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

More importantly, in recent years the tribe has established a tribal corporation, Yakama Forest Products (YFP). YFP currently operates two sawmills within the Reservation, where it manufactures finished products from raw lumber. The Yakama tribal government is depending upon this enterprise to provide steady and solid employment for its enrolled members. As YFP expands into wood products markets around the United States, federal taxes on its highway shipping will have a substantial economic impact on the tribe, one that the Yakama people did not contemplate when they signed the Treaty of 1855.

SUMMARY OF ARGUMENT

In ruling that the petitioner, an enrolled Yakama tribal member, was not exempt from federal heavy vehicle and diesel fuel taxes, the U.S. Court of Appeals for the Ninth Circuit applied a legal standard for Indian treaty tax exemptions that is in direct conflict with prior decisions of this Court. The Court of Appeals held that there must be "express exemptive language" within a treaty. When it found none in the Yakamas' 1855 treaty, it disallowed any exemption from federal taxes, despite its prior decision in *Cree v. Flores* construing the same language and finding an exemption from state fees.

However, in three prior cases (*Choate v. Trapp, Carpenter v. Shaw*, and *Squire v. Capoeman*), this Court established the rule that tax exemptions in Indian treaties and statutes should be construed liberally in favor of Indians. Despite the rule in tax cases that exemptions should be strictly construed, the Court has followed the principle that Indian treaties should be construed as the

Indians understood them at the time of the treaty signing. Because the Ninth Circuit Court demands a strict construction of tax exemptions before liberal construction can be employed, it clearly declines to follow this rule.

Moreover, this error has put the Court of Appeals in conflict with three other U.S. Circuit Courts. The Third, Eighth and Tenth Circuits have all declined to follow the Ninth Circuit's requirement of an "express" exemption, instead concluding that such an exemption should merely be "rooted in the text" of an Indian treaty. The approach of these other courts is more in keeping with this Court's precedent requiring liberal construction of treaty language.

ARGUMENT

I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS CONFLICTS WITH PRIOR RULINGS OF THIS COURT REQUIRING LIBERAL CONSTRUCTION OF INDIAN TREATY LANGUAGE IN TAX EXEMPTION CASES

The decision of the Ninth Circuit Court of Appeals, which declines to read the Yakama Treaty as exempting the petitioner from the federal taxes at issue, rests on the principle that there must be "express exemptive language" within the treaty. *Ramsey v. U.S.*, 302 F.3d 1074, 1078 (9th Cir. 2002). Although the court correctly points out that "the language need not explicitly state that Indians are exempt from the specific tax at issue," it goes on to give examples of what would be acceptable as "express exemptive language" ("free from encumbrance," "free from taxation,"

"free from fees"). *Id.* at 1078. The Court of Appeals then reaches the following conclusion:

> Only if express exemptive language is found in the text of the statute or treaty should the court determine if the exemption applies to the tax at issue. At that point, any ambiguities as to whether the exemptive language applies to the tax at issue should be construed in favor of the Indians. *Id.* at 1079.

In applying this standard to Article III of the Treaty of June 9, 1855 between the Yakama Nation and the United States (12 Stat. 951), the Court of Appeals concluded that neither the words "free access . . . to the nearest public highway" nor "the right, in common with citizens of the United States, to travel upon all public highways" provided an "express exemption" from federal heavy vehicle and diesel fuel taxes. *Id.* at 1080. The opinion employs a standard that is essentially two pronged: first there must be a strict construction of the treaty language, and then a liberal construction to resolve any ambiguities in the strict construction. See also *Confederated Tribes of the Warm Springs Reservation of Oregon v. Kurtz*, 691 F.2d 878, 881 (9th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); *Karmun v. Commissioner*, 749 F.2d 567, 569 (9th Cir. 1984), *cert. denied*, 474 U.S. 819 (1985). The Court of Appeals uses this test despite its previous decision liberally construing the very same Article III language and concluding that there is an exemption from *state* taxation and licensing. *Cree v. Flores*, 157 F.3d 762, 769 (9th Cir. 1998).

However, this rule does not follow the precedent of this Court. In the last century the Court decided three cases that laid out the test to be used to determine the effect of Indian treaties, agreements and statutes on the

ability of both states and the federal government to tax Indians. Applying a liberal standard of construction, the Court found tax exemptions where a more strict construction might find none. The Court of Appeals in *Ramsey v. U.S.* did not apply this canon of construction to the Yakamas' Treaty of 1855, thus placing its decision squarely in conflict.

The first two cases construed the 1897 Atoka Agreement between the Choctaw and Chickasaw Nations and the United States, later codified by Congress in the Curtis Act of June 28, 1898 (30 Stat. at L. 505, chap. 517). In 1912 the Court held that language in the Atoka Agreement exempted allotted Indian lands from state taxation despite the usual rule that tax exemptions must be strictly construed. *Choate v. Trapp*, 224 U.S. 665, 676 (1912). Reaching back to the words of Chief Justice John Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court confirmed the principle that "the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning." *Id.*, 224 U.S. at 675 (citing *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866)). Because Indian treaties must be construed "in the sense in which they would naturally be understood by the Indians," the Court concluded that the Atoka Agreement "should be liberally construed in their favor in determining the rights granted to the Choctaws and Chickasaws." *Id.* (citing *Jones v. Meehan*, 175 U.S. 1 (1899)).

Twenty-eight years later the Court revisited the same phrase in the Atoka Agreement, holding that it also provided a state tax exemption for a royalty interest in an allotment's oil and gas. *Carpenter v. Shaw*, 280 U.S. 363,

367 (1930). In applying a liberal construction, the Court found the following:

> Having in mind the obvious purpose of the Atoka Agreement to protect the Indians from the burden of taxation with respect to their allotments and this applicable principle of construction, we think the provision that 'the lands allotted shall be non-taxable while the title remains in the allottees' cannot be taken to be restricted only to those taxes commonly known as land or real estate taxes, but must be deemed at least to embrace a tax assessed against the allottees with respect to a legal interest in their allotment less than the whole, acquired or retained by them by virtue of their ownership. *Carpenter v. Shaw*, 280 U.S. at 367.

In most tax cases, a strict construction of the words "lands allotted" would probably have resulted in a holding that the state could indeed tax oil and gas royalties on such lands. However, in *Carpenter* the Court looked beyond the plain language to examine the intent of the parties (the U.S. and the tribes) upon signing the Atoka Agreement. *Id.* ("whatever was the meaning of the present exemption clause at the time of its adoption must be taken to be its effect now").

The Court affirmed this rule of construction in *Squire v. Capoeman*, 351 U.S. 1 (1956), this time applying it to a federal Indian statute, the General Allotment Act of 1887. *Squire* held that the words "free of all charge and encumbrance whatsoever" in a land patent under the Act could be construed to exempt such allotment from federal capital gains tax. *Squire v. Capoeman*, 351 U.S. 1, 7 (1956). Again the language was "not expressly couched in terms of

non-taxability," but the Court construed the phrase to have broader meaning. *Id.* at 6.

This line of cases establishes that in cases where the text of an Indian treaty or statute might have a more expansive purpose (based on the intent of the Indians at the time of the treaty's execution), such purpose should be given effect. This is true even though the usual test for federal tax exemptions is that "the intent to exclude must be definitely expressed." See *Choteau v. Burnet*, 283 U.S. 691, 697 (1931). Therefore, the rule that the Court of Appeals stated in *Ramsey* is not correct. For purposes of determining a tax exemption, a court should not construe an Indian treaty as if it were specifically drafted with federal taxation in mind. If that were the rule, the liberal canons of construction would never come into play at all, and Chief Justice Marshall's original doctrine in *Worcester* would be a nullity.

II. THE OPINION OF THE COURT BELOW CONFLICTS WITH THE LIBERAL STANDARDS FOR TREATY CONSTRUCTION OF FEDERAL TAX EXEMPTIONS EMPLOYED BY THREE OTHER CIRCUIT COURTS

As a result of its failure to follow this Court's prior decisions regarding the canons of Indian treaty construction, the Ninth Circuit Court of Appeals is currently in conflict with three other U.S. Circuit Courts. Each of the three courts avoids the requirement of an "express exemption," and instead employs a liberal standard to determine whether Indian tribes intended a tax exemption to apply. This position is correct and should be upheld by this Court.

The current disagreement among the courts is best described by the Third Circuit Court of Appeals in *Lazore v. Commissioner of Internal Revenue Serv.*, 11 F.3d 1180 (3rd Cir. 1993). In *Lazore* the court examined 1794 treaties between the U.S. and Haudenosaunee (Iroquois). Although it found that the treaty ultimately did not exempt members of the Mohawk Nation from federal income tax, the court accurately summarized this Court's prior rulings:

> We interpret the Court's statement that an exemption must "derive plainly" from a treaty, together with its conclusion in *Choteau* that treaties cannot support an exemption without a "provision" concerning "the liability of an individual to pay tax upon income," to stand for the proposition that an exemption must be rooted in the text of a treaty. Furthermore, because all Indian treaties were entered into long before the passage of the income tax, *the fact that the parties to a treaty did not negotiate with the federal income tax in mind is immaterial. As such, silence as to matters of taxation will never be sufficient to establish an exemption. Lazore*, 11 F.3d at 1184 (emphasis added).

The court points out that the Court's doctrine requiring that an exemption derive "plainly from treaties" and the doctrine requiring "provisions" expressly dealing with tax liability appear to be in conflict. *Id.* However, it explains that "the Court has avoided this result by crafting a special set of rules to be used in interpreting treaties." *Id.* Such liberal rules of construction have the practical effect of permitting "language that could not have been concerned with the income tax to nevertheless create an exemption from it." *Id.*

Through this analysis *Lazore* concluded that the Ninth Circuit's approach is incorrect, accepting instead the Eighth Circuit's statement that liberal interpretation "comes into play only if [the] statute or treaty contains language which can *reasonably be construed* to confer income tax exemptions." *Holt v. Commissioner of Internal Revenue*, 364 F.2d 38, 40 (8th Cir. 1966), *cert. denied*, 386 U.S. 931 (1967) (emphasis added). The *Lazore* court explained why *Holt's* reasoning makes more sense:

> This formulation gives appropriate weight to the notion that a treaty-based tax exemption must have a textual basis and accounts for the interpretive rules applicable to Indian treaties. We specifically reject the Ninth Circuit's requirement that a treaty contain a "definitely expressed exemption" [citing *Kurtz*, 691 F.2d at 882], because we believe that it insufficiently accounts for these rules of liberal construction. *Lazore*, 11 F.3d at 1185.

Thus both the Eighth and Third Circuits have properly accounted for both of this Court's doctrines: first, that the exemption must be somewhere in the text of the treaty, and that it be liberally construed in favor of the Indians.

Recently the Tenth Circuit has also adopted this approach in a case that looked at Article VII of a treaty with the Chickasaws and Choctaws. *Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2000), *reversed on other grounds*, 534 U.S. 84 (2001). Contrasting the Ninth Circuit in *Kurtz* with *Lazore* and *Holt*, the court stated that "because we conclude this latter approach is the more reasonable one, we adopt and apply it in reviewing the 1855 treaty between the Nation and the United States." After review, the court concluded that the words "unrestricted right of self-government" in the treaty did not

exempt the Chickasaw Nation from federal wagering taxes on pull-tab gaming activities.

Because the rule in *Kurtz* was followed by the Ninth Circuit in the *Ramsey* decision, it is clear that there is a real conflict between *Ramsey* and *Chickasaw*, *Lazore* and *Holt*. While the Third, Eighth and Tenth Circuits have properly interpreted this Court's Indian tax decisions to mean that liberal treaty construction should be used whenever tax exemptions can reasonably be found in the text, the court in both *Kurtz* and *Ramsey* has followed a rule that impermissibly demands an express treaty reference to taxation.

CONCLUSION

The strict construction test employed in this case by the Court of Appeals for determining an exemption from federal taxation is not consistent with the doctrine, set forth by this Court in a number of tax decisions, that Indian treaty provisions should be liberally construed in favor of Indians. As a result, it is also not consistent with the standard used by three other Circuit Courts of Appeals. For these reasons, this Court should grant the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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